

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2777

Cir. Ct. No. 2006CM1136

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN M. RODRIGUEZ-FAUSTINO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL M. KONKOL, Judge. *Affirmed and cause remanded with directions.*

¶1 CURLEY, P.J.¹ Juan M. Rodriguez-Faustino appeals the order denying his motion seeking to withdraw his 2006 guilty plea to misdemeanor possession of cocaine, the sentence for which he has completed. He contends that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12).

his trial attorney was ineffective for telling him that he would not be deported for this conviction because he has recently discovered that this conviction is preventing him from becoming a naturalized citizen. He claims that he did not bring this motion pursuant to WIS. STAT. § 974.06 (2011-12),² as the trial court construed it; instead, he submits that his motion is “akin to a motion to withdraw a guilty plea pursuant to [WIS. STAT. §] 971.08(2)” and that he should be allowed to withdraw his plea.³ Rodriguez-Faustino argues that because his motion alleges sufficient facts which, if true, would entitle him to the relief requested, the trial court erred in denying the motion without a hearing.

¶2 This court agrees with the trial court that it has no jurisdiction over this matter as: (1) Rodriguez-Faustino is no longer in custody, and thus, he cannot pursue this motion under WIS. STAT. § 974.06; and (2) the time limits for appealing this conviction pursuant to WIS. STAT. § 809.30 have long since expired. In addition, because Rodriguez-Faustino has cited no case law supporting his novel theory that a defendant relying upon his attorney’s advice concerning immigration issues is entitled to the same remedy as that when a court fails to advise a defendant as mandated by WIS. STAT. § 971.08(1), this court declines to address it.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

³ WISCONSIN STAT. § 971.08(2) obligates the trial court to withdraw a conviction if a court failed to advise a defendant that “a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization under federal law,” and the defendant can show the plea is likely to result in any of the three above listed possibilities.

¶3 Inasmuch as the trial court determined that it lacked jurisdiction, the motion should have been dismissed, not denied, and the matter will be remanded to effect this result. *See State v. Theoharopoulos*, 72 Wis. 2d 327, 329, 334, 240 N.W.2d 635 (1976).

BACKGROUND

¶4 On March 23, 2006, Rodriguez-Faustino was charged with misdemeanor possession of cocaine, contrary to WIS. STAT. §§ 961.16(2)(b)1. and 961.41(3g)(c). According to the complaint, the cocaine was discovered on March 7, 2006, in Rodriguez-Faustino's wallet while he was in the booking room at the Milwaukee County Jail. On November 2, 2006, Rodriguez-Faustino pled guilty to the charge with the aid of a Spanish interpreter. The guilty plea form signed by Rodriguez-Faustino was written in both English and Spanish. The preprinted form stated that, "I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law." The trial court personally addressed Rodriguez-Faustino and discussed with him the consequences of his plea if he is not a United States citizen.

¶5 On January 30, 2007, the trial court sentenced Rodriguez-Faustino to sixty days in the House of Correction with Huber privileges. However, the trial court stayed the sentence, placed Rodriguez-Faustino on probation for twelve months, and ordered him to pay a \$250 fine. At the same time, according to the judgment roll, the trial court denied a request that this case be capable of being expunged after the completion of the sentence.

¶6 On September 5, 2012, Rodriguez-Faustino brought a motion seeking to withdraw his guilty plea. In his motion and accompanying affidavit, he

claimed that his then-attorney told him, contrary to the statements contained in the guilty plea questionnaire and those of the trial judge, that he need not worry about being deported because the government would not attempt to deport him for this type of conviction.⁴ He asserted in his motion that the advice given by his attorney at the time he pled guilty amounted to ineffective assistance of counsel, citing the 2010 United States Supreme Court case *Padilla v. Kentucky*, 130 S.Ct. 1473, 1475-1476 (2010).

¶7 The trial court issued a written decision denying Rodriguez-Faustino's request. The trial court noted that while the *Padilla* decision recognized that criminal defense attorneys have an affirmative duty under the Sixth Amendment to provide non-citizen clients with accurate advice about the possibility of deportation, *Padilla* was not decided until four years after Rodriguez-Faustino's guilty plea. In addition, unlike the situation here, when Padilla brought his action seeking relief from his guilty plea he was still serving his sentence. Moreover, the trial court noted that prior to the *Padilla* ruling Wisconsin law did not require lawyers to inform their non-citizen clients of the immigration consequences of a guilty plea.

¶8 The trial court also concluded that it had no jurisdiction in this matter because WIS. STAT. § 974.06 applies only to those defendants who are still serving their sentences, and here, Rodriguez-Faustino has completed his sentence.

⁴ In his motion, Rodriguez-Faustino, despite the guilty plea questionnaire being printed in English and Spanish, also claimed not to have understood parts of the guilty plea questionnaire. This claim is belied by the record because after advising the trial court that he did not understand everything in the form, Rodriguez-Faustino was asked if his attorney went through the form with him and whether he understood everything that he explained to him and he answered "yes."

Further, the trial court found that the time limits for appeal under WIS. STAT. § 809.30 had long since passed.

¶9 On appeal, Rodriguez-Faustino has modified his argument. He now contends that his motion seeking to withdraw his plea because of the ineffective assistance of his then-attorney should be treated as “more akin to a motion to withdraw a plea where the court failed to give the defendant the immigration warning” required by WIS. STAT. § 971.08(2). He reasons that because WIS. STAT. § 971.08(2) permits a defendant to bring a motion “at any time” to withdraw his plea, the legislature made a policy decision to grant competency to courts to hear motions where the defendant is subject to immigration proceedings and entered his plea without proper knowledge of the immigration consequences. Thus, he argues, “it should make no difference whether the defendant’s ignorance concerning immigration consequences was due to the judge’s failure to give the statutory warning, or to defense counsel’s inaccurate advice....” In sum, Rodriguez-Faustino contends that a trial court always “possesses competence to entertain such a motion at any time,” and that his motion entitled him to a hearing because his plea was rendered involuntary by counsel’s inaccurate advice.

ANALYSIS

¶10 This court first addresses the question of whether the trial court had jurisdiction to hear the motion under WIS. STAT. § 974.06 or WIS. STAT. § 809.30. The trial court correctly determined that in order to avail oneself of § 974.06, the defendant must be serving a sentence. *See State v. Bell*, 122 Wis. 2d 427, 430-31, 362 N.W. 2d 443 (Ct. App. 1984). As to § 809.30, the record reflects that Rodriguez-Faustino was advised of his right to appeal the conviction by the trial court on January 30, 2007, and was told that he had twenty days in which to do so.

Rodriguez-Faustino never filed an appeal and the time limit for doing so has long since expired.

¶11 This court also agrees with the trial court’s analysis concerning the effect of the *Padilla* case. The law in Wisconsin at the time of Rodriguez-Faustino’s conviction did not require criminal attorneys to advise their clients of the consequences of their pleas to future immigration issues. *See State v. Santos*, 136 Wis. 2d 528, 532-33, 401 N.W.2d 856 (Ct. App. 1987) (defendant’s trial attorney was not ineffective for failing to advise defendant concerning possible deportation because deportation was a collateral consequence of guilty plea). Furthermore, since the trial court issued its decision, the United State Supreme Court has recently held that the requirements of the *Padilla* case are not retroactive. *See Chaidez v. United States*, 133 S.Ct. 1103, 1113, (2013) (“This Court announced a new rule in *Padilla*. ... [D]efendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding.”).

¶12 This court next looks to the notion advanced by Rodriguez-Faustino that because he would be entitled to withdraw his plea had the trial court failed to advise him of the possible consequences his plea might have on any future immigration issues, his attorney giving him what he claims is faulty immigration advice entitles him to the benefits of WIS. STAT. § 971.08(2).

¶13 As the State points out, this argument was never raised before the postconviction court and this court ordinarily does not consider arguments that were not raised below. *State v. Rogers*, 196 Wis. 2d 817, 825-26, 829, 539 N.W.2d 897 (Ct. App. 1995) (failure to raise specific challenges in the trial court waives the right to raise them on appeal). Further, Rodriguez-Faustino cites no legal authorities for his argument. Generally, this court does not consider

arguments unsupported by references to relevant legal authority, nor will it develop an appellant's argument for him. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Also, it would appear Rodriguez-Faustino's argument is based on a false premise. Contrary to Rodriguez-Faustino's argument that such a motion can be brought "at any time," nowhere in § 971.08(2) do the words "at any time" appear. In light of the failure to raise this issue in the trial court and lack of legal authority, this court declines to address his argument further.

¶14 Finally, this court observes that what occurred here may not have actually constituted ineffective assistance of counsel as Rodriguez-Faustino claims. In his affidavit, he states that his trial attorney told him "that the government would not attempt to deport [him] over such a minor conviction." Rodriguez-Faustino entered his plea in November 2006 and was sentenced in January 2007. He still remains in the United States, over six years later. His attorney's advice appears to have been sound. Moreover, in his motion, Rodriguez-Faustino claims that he is now having difficulty becoming a naturalized citizen. From what has been submitted, the defendant's attorney never told him that the conviction would not endanger his chances of becoming a naturalized citizen, only that he would not be deported for this conviction.

¶15 Therefore, for the foregoing reasons, the trial court's order is affirmed; however, inasmuch as the proper remedy for lack of jurisdiction is dismissal of the motion, *see Theoharopoulos*, 72 Wis. 2d at 334, this case is remanded to the trial court for dismissal.

By the Court.—Order affirmed and cause remanded with directions to dismiss Rodriguez-Faustino’s petition.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

